UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

FCA US LLC
Respondent

and **CASES 07-CA-219895**
07-CA-221914

LOCAL 723, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

Union

RESPONDENT FCA US LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully Submitted,

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I. INTRODUCTION[1]

On November 5, 2019, Administrative Law Judge Melissa M. Olivero issued her decision in this matter. The ALJ found merit to all allegations in the Consolidated Complaint, and found that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide information and unreasonably delaying in providing information. The ALJ's recommended order includes production of the outstanding information, even information that was established by the record as no longer existing, and the posting of a Notice.

In finding merit to the Consolidated Complaint allegations and recommending the remedy, the ALJ's errors generally take the following forms: 1) the the ALJ consistently and throughout her decision erroneously relied upon the Union's trial testimony explaining its theory of the relevance of the requested information, even though the Union had never communicated its explanation of relevance to Respondent in response to Respondent's challenges to relevance; 2) the ALJ relied upon boilerplate language the Union included in its requests, such as stating it needed information to "bargain intelligently," "process grievances," "and/or adjust or resolve gtievances," without the Union establishing actual relevance to grievances to erroneously find relevance of requested items; 3) the ALJ erred by finding that information regarding disciplines issued to non-bargaining unit members was relevant despite the absence of the Union establishing to Respondent a factual and logical basis for needing the information, and by relying upon testimony at trial regarding relevance that was never communicated to Respondent in response to Respondent's challenges to relevance; 4) the ALJ erred by applying ***American***

[1] ALJ" refers to Administrative Law Judge Melissa M. Olivero; "ALJD" refers to the ALJ's decision dated November 5, 2019. "Tr." refers to the transcript of the administrative hearing; "GCX," and "RX" refer to Counsel for the General Counsel's exhibits and Respondent's exhibits, respectively. The final four pages of the ALJD (19-22) are not line numbered. Respondent has manually counted the lines, but cautions that the counting inadvertently may not be precise.

Baptist Homes of the West d/b/a Piedmont Gardens, 362 No. 139 (2015) to her analysis of whether Respondent was obligated to disclose a confidential witness statement to the Union, rather than ***Anheuser-Busch, Inc.***, 237 NLRB 982 (1978); and 5) the ALJ erred by finding that outstanding information items were not mooted by the Union's withdrawal of the underlying grievances without the opportunity for them to be reinstated, and by the Union's failure to respond to Respondent's follow-up inquiries regarding the continuing relevance of the items.

In addition, the ALJ erred by finding that Respondent unreasonably delayed in producing team leader interview forms.

Respondent urges that the Consolidated Complaint allegations be dismissed in their entirety. To the extent that the Board finds merit to the Consolidated Complaint allegations, if any, the Union's need for the outstanding information has shown to be moot.

II. THE INFORMATION REQUESTS

A. APRIL 17TH REQUEST

Following the issuance of a three-day disciplinary layoff to bargaining unit employee Kelli Newkirt (RX2), on April 17, 2018, Mark Willingham submitted a request for information to numerous members of management, including to Labor Relations Supervisor Nick Weber, Jr. (RX4). He also copied Union officials, including Shop Chairmain Lorenzo Jamison, Sr. With this information request, the ALJ erroneously found that the information was not provided in violation of Section 8(a)(5) and (1) of the Act. (ALJD p. 18, lines 13-16) This information, however, was either not demonstrated to be relevant upon Respondent's questioning of relevance (information regarding non-bargaining unit disciplines and plant production numbers), or fully provided to the extent it existed (taxi pulls).

1. **The ALJ erred by finding Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide non-bargaining unit discipline information and plant production numbers**

Neither the requested non-bargaining unit discipline information or plant production numbers are presumptively relevant information as neither are wages, benefits or other terms and conditions of employment of the bargaining unit, and they do not, standing alone, directly concern wages, benefits, or other terms and conditions of employment. ***NP Palace LLC d/b/a Palace Station Hotel & Casino***, 368 NLRB No. 148, slip op. at 3 (2019).[2]

Where the requested information concerns bargaining unit employees or their terms and conditions of employment, the Board has generally presumed that the information is relevant and producible unless the employer rebuts the presumption of relevance. ***Disneyland Park***, 350 NLRB at 1257; ***IronTiger Logistics***, 366 NLRB No. 2, slip op. at 1. Where no such presumption exists, the Union bears the burden to establish relevance. ***Shoppers Food Warehouse Corp.***, 315 NLRB 258, 259 (1994). The ALJ accurately cited the Union's burden, however, she then failed to correctly apply it. (ALJD p. 15, lines 15-45; ALJD p. 17, lines 18-45; ALJD p. 18, lines 1-7)

[2] The ALJ made two findings of relevance with regard to plant production numbers: she first found that they were presumptively relevant (ALJD p. 15, lines 33-35) for the sole reason that the Union stated the purpose of processing a grievance on behalf of a bargaining unit member, based on the boilerplate language in the Union's initial request for information. (RX4; GCX9) Under this flawed reasoning, which is contrary to Board law, anything could potentially be presumptively relevant by adding these magic words. However, the type of boilerplate, general conclusory statements that the ALJ relied upon here have been rejected by the Board and courts. As the Supreme Court has explained, "a union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." ***Detroit Edison Co. v. NLRB,*** 440 U.S. 301, 314 (1979). The Board has held that an employer has no duty to provide information to a union where the union has stated that it needs information to process a grievance, and the union has not demonstrated there is actual relevance to the grievance. See ***United Parcel Service***, 362 NLRB 160, 161-163 (2015).

Non-Bargaining Unit Discipline Information

The Consolidated Complaint alleges that Respondent unlawfully failed to provide disciplinary information pertaining to non-bargaining unit employees (GCX1). The Union requested, on April 17, 2018, that Respondent provide it with a list of all individuals disciplined for violations of Standard of Conduct #3, 5, 6, 11, and 14, and disciplines served for violations of Standard of Conduct #3, 5, 6, and 11, in the past two years, for hourly and salaried employees. (RX4). The Union incorrectly numbered the items in its initial request. (RX4) Respondent, in its reply, combined the response of the listing of employees and disciplines served and sequentially numbered its response, providing the responsive disciplinary information pertaining to bargaining unit employees, but stating that Respondent did not see the relevance with regard to non-bargaining employees. (RX5) In reply, the Union stated that the Standards of Conduct applied to all FCA employees, recited boilerplate language that it needed it "in order to intelligently resolve or process future grievances," and restated what it wanted. (RX6) Contrary to the ALJ's erroneous findings (ALJD p. 5, line 40; ALJD p. 6, lines 1-8, ALJD p. 5, lines 35-40; ALJD p. 7, lines 4-5; ALJD p. 17, lines 24-25, 36-38, ALJD p. 18, lines 6-7, lines 18-19) the Union failed to establish the relevance of this information.

As set forth above (see footnote 2), the Board has held that the general type of boilerplate language recited by the Union in its initial request and follow-up that it needed the information to "intelligently resolve or process future grievances" is insufficient to establish relevance, noting that the "theory of relevance must be reasonably specific; general avowals of relevance such as 'to bargain intelligently' and similar boilerplate is insufficient." ***SuperValu Stores, Inc.***, 279 NLRB at 25; see also ***F.A. Bartlett Tree Expert Co.***, 316 NLRB at 1313. Indeed, the Supreme Court has likewise stated, "a union's bare assertion that it needs information to process a

grievance does not automatically oblige the employer to supply all the information in the manner requested." ***Detroit Edison Co. v. NLRB,*** 440 U.S. 301, 314 (1979). Moreover, the Board has held that an employer has no duty to provide information to a union where the union has stated that it needs information to process a grievance, and the union has not demonstrated there is actual relevance to the grievance. See ***United Parcel Service***, 362 NLRB at 161-163. The union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation to supply information. ***Island Creek Coal***, 292 NLRB 480, 490 fn. 19 (1989).

Specific to information pertaining to employees outside of the bargaining unit, despite Respondent repeatedly questioning relevance to the Union, the Union still failed to establish a factual and logical basis for needing the information to Respondent. ***United States Postal Service***, 310 NLRB 391, 392 (1993); ***Tegna, Inc.***, 367 NLRB No. 71, slip op. at 2 (2019). The Board has consistently held that, in order to establish the relevance of non-bargaining unit disciplines to a union's collective bargaining duties, a union must demonstrate a reasonable belief in its relevance supported by objective evidence. ***United States Testing***, 324 NLRB 854, 859 (1997) enfd. 160 F.3d 14 (D.C. Cir. 1998); ***Reiss Viking***, 312 NLRB 622, 625 (1993). Not only must the union demonstrate this reasonable belief in its relevance supported by objective evidence, it must also **communicate this to the employer** (emphasis added). ***Disneyland Park***, 350 NLRB 1256, 1257-1258 (2007). The Union communicated no objective evidence in support of its theory of relevance to Respondent. Compare with ***E.I. DuPont De Nemours***, 366 NLRB No. 178, slip op. at 4 (2018) (The union there provided an explanation to the employer that it needed information regarding non-bargaining safety violations in order to evaluate how five specifically identified supervisors were treated in comparison with the grievant because

employees had observed them committing serious safety violations, and the union was aware that the supervisors were not terminated as the grievant was, despite being subject to the same safety rules as bargaining unit employees. The union in ***E.I. Du Pont*** additionally explained to the employer that it needed the information pursuant to the parties' past practice of presenting comparison cases at arbitration).

Nonetheless, and despite the Union bearing the burden of establishing the relevance of the non-bargaining unit discipline information, the ALJ erroneously attributed both the inadequate boilerplate language of needing the information for grievance processing, and the testimony only adduced at trial regarding a specific supervisor(s) who may have been seen to violate Standards of Conduct as it related to Kelli Newkirt's grievances, which the record fails to establish was communicated to Respondent, in order to find the Union met its burden in establishing relevance. (ALJD p. 17, lines 18-45; ALJD p. 18, lines 1-9) The ALJD is replete with these errors. Nowhere in the record is it established that the Union communicated to Respondent that it sought information on non-unit employees in order to see if salaried employees were treated the same as unit employees for violations of Respondent's Standards of Conduct. (ALJD p. 6, lines 5-8) Nowhere in the record is there evidence that the Union communicated to Respondent in response to its relevance challenge that the Union was investigating Respondent's consistency in enforcing its Standards of Conduct and disciplinary policies. (ALJD p. 17, lines 36-38) Nowhere in the record is it established that the Union requested information pertaining to "disparate treatment" from Respondent. (ALJD p. 19, lines 20-26; ALJD p. 20, lines 1-4) To the contrary, Mr. Willingham acknowledged on cross-examination that his communications with Respondent did not reference disparate treatment or any references to actions by specific supervisors. (Tr. 137-138) All the Union stated to

Respondent was versions of "FCA's Standards of Conduct applies to all employees," and "in order to intelligently resolve or process future grievances, the Union requests this data, respectfully (what's in the employment jackets of salary workers who were disciplined for said SOC violations?") (RX6, RX7, GCX9). Without the element of the Union communicating sufficient objective evidence to Respondent to support its claim of relevance in response to Respondent's requests, the Union has not met its burden.

In the instant case, Mr. Willingham articulated some theory of disparate treatment at trial in response to the GC's questioning (Tr. 79-80). However, the record fails to establish he communicated **to Respondent** that he needed the non-supervisory disciplines for disparate treatment purposes or in relation to specific supervisor(s)[3] he might have seen violate Standards of Conduct and evade discipline. (Tr. 137-138) His testimony regarding disparate treatment was simply a post-hoc justification advanced at trial. Under these circumstances, relevance was not established at the time of the request.[4]

Moreover, the unrefuted testimony established that discipline was assessed under completely different and separate schematics for bargaining unit employees than for non-bargaining employees at Dundee Engine Plant. Bargaining unit employees have a negotiated progressive discipline process. (RX3) Salaried employees do not have any progressive discipline policy. (Tr. 183-184) Discipline is investigated and assessed by the Labor Department at Dundee Engine Plant for bargaining unit employees, which has no role in investigating or assessing salaried employee' disciplines. (ALJD p. 3, lines 13-14; Tr. 13, 184) The GC and

[3] Mr. Willingham testified vaguely with regard to this, and claimed he had witness statements, which were not introduced.

[4] In addition, without knowing the alleged objective evidence supporting his request for non-bargaining unit discipline information at the time of the request, Respondent was precluded from exploring with the Union potential ways to narrow the response to what the Union appeared, from Mr. Willingham's testimony, to be seeking—whether Kelli Newkirt's supervisor was disciplined for alleged similar conduct. (Tr. 79)

Union's claim that the applicability of a rule or policy is enough to make data on all employees subject to that rule relevant to bargaining unit employees without more, and under such differing circumstances, is without merit. Compare with ***Pfizer, Inc.***, 268 NLRB 916, 918 (1984) (relevance of non-bargaining unit disciplines established where same policy of considering work records as a determining factor in assessing disciplines and the same progressive discipline applied to both the bargaining unit employees and the non-bargaining unit employees about whom the disputed information was sought). Accordingly, the GC and the Union have not established a factual and a logical basis for the non-bargaining unit discipline information, and the ALJ erred by finding relevance was established and Respondent violated Section 8(a)(5) and (1) by failing to produce this information. Accordingly, these allegations should be dismissed.

Plant Production Numbers

The April 17th request for information included a request for two weeks of production numbers. (RX4) Testimony established that production numbers are the number of engines produced for all of Dundee Engine Plant on a given day on each shift. (Tr. 186-187) Other than give general boilerplate statements that the information was needed to "investigate a grievance or grievances" and to "bargain intelligently and or [sic] to adjust or resolve grievances," the Union provided no articulation of relevance to Respondent, despite Respondent stating that it did not see the relevance of this item repeatedly. (RX5, RX6) The Supreme Court and the Board have held that such general assertions are insufficient to establish relevance, however, the ALJ erroneously found this sufficient to establish relevance.

As explained, this is not presumptively relevant information: the information sought—production numbers for the entire plant for two weeks—is not specific to the bargaining unit or the terms and conditions of employment of the bargaining unit. Although Respondent told the

Union that it did not see the relevance of this item, the Union failed to articulate relevance to Respondent in response. Nonetheless, the ALJ erroneously relied upon the Union's boilerplate statement that the request was relevant to a grievance to establish relevance (ALJD p. 15, lines 33-35), as well as the Union's testimony at trial, again never communicated to Respondent despite Respondent's challenge to the relevance of this item. (ALJD p. 6, lines 12-15; GCX9). The ALJ's finding with respect to this item is particularly troublesome since Respondent stated it did not understand the relevance of this request item ***after*** receiving the boilerplate language upon which the ALJ partially relies upon and never received a response from the Union except a regurgitation of the boilerplate. (RX4, RX5, RX6, RX7) Again, in the case of information that is not presumptively relevant, it is the Union's burden to establish relevance. The ALJ's finding and conclusion that the Union established relevance in the light of the Union's failure to respond substantively, and attribute trial testimony never communicated to Respondent as satisfying the Union's burden is clear error.

The Board has held that the general type of boilerplate language stated by the Union in its initial request is insufficient to establish relevance, noting that the "theory of relevance must be reasonably specific; general avowals of relevance such as 'to bargain intelligently' and similar boilerplate is insufficient." ***SuperValu Stores, Inc.***, 279 NLRB 22, 25 (1986), affirmed mem., 815 F.2d 712 (8th Cir. 1987); see also ***F.A. Bartlett Tree Expert Co.***, 316 NLRB 1312, 1313 (1995). Moreover, the Board has held that an employer has no duty to provide information to a union where the union has stated that it needs information to process a grievance, and the union has not demonstrated there is actual relevance to the grievance, even in the case of presumptively relevant information. See ***United Parcel Service***, 362 NLRB 160, 161-163 (2015). The union's explanation of relevance must be made with some precision; and a generalized, conclusory

explanation is insufficient to trigger an obligation to supply information. ***Island Creek Coal***, 292 NLRB 480, 490 fn. 19 (1989). "A union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested." ***Detroit Edison Co. v. NLRB,*** 440 U.S. at 314. The Union failed to establish relevance to Respondent with respect to this item, and this allegation should be dismissed.

2. The ALJ erred by finding and concluding Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide taxi pulls

The April 17th information request includes a request for taxi pulls, which are delivery requests. This item is not alleged in any of the charges (GCX1), and should thus be dismissed from a due process standpoint.[5] Substantively, the evidence established that, because the information no longer existed locally, the plant had Corporate IT retrieve all existing information and provided what existed to the Union. (RX8, RX9) The Union has been told they have all existing information. (RX9, Tr. 197-198) Despite the ALJ's findings (ALJD p. 15, lines 25-28), Respondent made diligent efforts to retrieve the information it could retrieve in response to the request (RX8, RX9), and there is no credible evidence that any evidence has been withheld. This portion of the request has been fully satisfied.

3. The ALJ erred by finding and concluding that the GC established the Union had an on-going need for the outstanding information alleged in the Consolidated Complaint

Even in the event the ALJ's findings and conclusions with regard to the merits of the

[5]The ALJ found that the GC's "amendment" was proper (ALJD p. 13, lines 17-22), however, the GC did not amend the Consolidated Complaint substantively with regard to Paragraphs 7(a) and (b), although he did correct a spelling in 7(a). (Tr. 7-8) These were simply added to the Consolidated Complaint without ever being alleged in a Charge.

Consolidated Complaint allegations, the GC has failed to establish that the Union has a continuing need for the outstanding information alleged in the Consolidated Complaint. ***Borgess Medical Center***, 342 NLRB 1105, 1106 (2004). The grievance which the GC and the Union argued related to Kelli Newkirt's discipline (R-10), and another grievance which neither argued related to the information request, but pertains to the same incident (R-11), were both withdrawn without the ability to be reinstated.[6] (RX10, RX11, RX12, JX1 p.34, Section 30(b)).

Moreover, following withdrawal of the grievances, Mr. Weber attempted to assess whether there was any continuing relevance for the information the Union claimed was related to the Newkirt grievances.[7] On October 9, he sent Union Shop Chairman Lorenzo Jamison, Sr., with whom the resolution of the grievance was reached, and who Mr. Willingham copied on the Newkirt request for information (RX4, RX5, RX6, RX7, RX8, RX9) and follow-up correspondence, asking if the information was still needed. Mr. Jamison replied that he would assume Mr. Willingham still wanted it if he never received it. Mr. Weber replied that if was any arguable relevance now that the grievance was resolved, he didn't see it. (RX25) Mr. Weber did not receive a response.

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[6] The grievances regarding Ms. Newkirt's discipline were resolved on September 25, 2018, and withdrawn without precedent.(Tr. 156, 236-237; GC5). Under the contract, at this point, they cannot be reinstated (J1, Section 30(b) on p. 34) Mr. Willingham asserted that the designation "WWP" on the grievance documents means withdrawn without prejudice, however, he was not the union official who withdrew the grievances—Lorenzo Jamison, Sr. was. Although Mr. Jamison testified, he did not address this issue and he was not recalled on rebuttal. Under the circumstances, an inference that his testimony would not have been consistent with Mr. Willingham's is appropriate. ***Martin Luther King, Sr. Nursing Center***, 231 NLRB 15, n.1 (1977) ("where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him"). Further, even if the grievances were withdrawn without prejudice, they are past the point in time in which they could be reinstated under Section 30(b) of the collective bargaining agreement. If a grievance is withdrawn without prejudice, it can only be reinstated within three months from the date of withdrawal. There is no contractual mechanism for these grievances to be reinstated regardless of the form of the withdrawal.

[7] The other information—the Watts interview forms and the Wilson statement—were provided and the only issue alleged in the Consolidated Complaint with regard to these items is unreasonable delay.

Thus, even in the event the outstanding information is deemed relevant (production numbers and non-bargaining unit disciplines) or could somehow be produced even though the record fails to establish it exists (taxi pulls), the information request is moot. The grievance(s) to which the Union claimed the information related are withdrawn with no ability to be reinstated. Neither the CG nor the Union established or even argued any current need for the information—the record is devoid of evidence of any continuing need. Under these circumstances, the Board has held that a respondent not be ordered to produce the information as the need for it has ceased to exist. ***Id.*** See also ***Westinghouse Electric Corp.***, 304 NLRB 703, n.1, 709 (1991) (no affirmative order to produce requested information in light of judge's finding that only demonstrated relevance was to a concluded arbitration that the arbitrator was without authority to reopen).

Notwithstanding the GC and the Union's failure to address the continuing need for the information anywhere on the record, the ALJ went to great lengths to make the argument of continuing relevance for the Union and the GC, even contradicting the GC's argument and the Union's testimony regarding the scope of the April 17 request. The ALJ erroneously found that a continuing need was established by the original request's boilerplate language "The information I have requested has relevance to a grievance and its investigation. [The] Union needs this information to bargain intelligently or to adjust or resolve grievances." (ALJD p. 19, lines 20-26; RX4) The ALJ read the plural "grievances" in the second sentence, found that this meant that the information request had to do with "a problem of disparate treatment affecting the larger unit," despite her acknowledgment that the Union had not stated this, and found that the Union had established a continuing need for all of the outstanding April 17 (non-bargaining unit

discipline information, taxi pulls, and production numbers). (ALJD p. 19, lines 20-26, 38-43; ALJD p. 20, lines 1-5) There is, frankly, no record support for her findings and conclusion.

Indeed, the GC stated in his opening statement: "The Union sought the information pertaining to . . Newkirt in order to process existing grievances." (Tr. 18) Likewise, Mark Willingham testified that he submitted the April 17 request for information based off Kelli Newkirt's discipline. (Tr. 76) Similar to ***Borgess,*** the Union has not asserted it needs the information to pursue the grievance in another forum and has not indicated that it needs the outstanding information for any other matter related to its collective bargaining duties. ***Id.*** Accordingly, Respondent has established that the Union's stated need is no longer present, and thus, the information should not be ordered produced.

B. JUNE 26TH REQUEST

The ALJ erroneously found and concluded, applying the balancing test set forth in ***American Baptist Homes of the West d/b/a Piedmont Gardens***, 362 No. 139 (2015), that Respondent unreasonably delayed in providing a witness statement to the Union taken pursuant to an FMLA fraud investigation by asserting a confidentiality concern, and offering to bargain an accommodation to satisfy its concern, then making a proposal of withholding the statement until the conclusion of the investigation, which the Union refused. The Union made no counterproposal or otherwise attempted to bargain with Respondent. Respondent turned the statement over at the conclusion of the investigation. (ALJD p. 16, lines 1-47; ALJD p. 17, lines 1-16; GCX10)

On June 25, 2018, Mark Willingham asked for a copy of bargaining unit employee Chris Wilson's statement, which Mr. Wilson would not complete during the taking of the statement, at the completion of his interview during an investigation into potential FMLA fraud. (Tr. 138,

141-142; GCX10; RX18) The employee refused to answer all questions during the first attempt to take his statement, and management had heard reports from a bargaining unit employee around that time that statements had been circulated to employees in the Union office (Tr. 245). In response to Mr. Willingham's request for the statement, Respondent evaluated the circumstances and the request, and found there were substantial and legitimate confidentiality considerations that were implicated. Consistent with ***Piedmont Gardens***, Respondent informed the Union that it had confidentiality concerns and offered to bargain an accommodation with the Union that satisfied its confidentiality concerns. To that end, Respondent offered to provide the statement to the Union at the conclusion of the investigation. The Union did not enter into discussions with Respondent or offer a counteroffer, but claimed that this was contrary to past practice. However, ***Piedmont Gardens*** requires a Respondent to do an analysis of each particular case, rather than to have a blanket rule, so that is what Respondent does, and that is what Respondent did here.

However, Respondent does not believe the standard articulated in ***Piedmont Gardens*** is the correct standard to apply with regard to disclosure of confidential witness statements, and urges the Board to return to the long-held categorical exemption articulated in ***Anheuser-Busch, Inc.***, 237 NLRB 982 (1978), exempting witness statements from disclosure to the Union in response to an information request. The advisability of returning to an approach that, as Member Johnson noted in his dissent to ***Piedmont Gardens***, will support employers' efforts to assure employee participation in workplace investigations, thereby encouraging the ability to do a more thorough investigation, protect participating witnesses from intimidation, retaliation or harassment by a union or coworkers, enable employers to effectively conduct investigations of

workplace misconduct, and promote the expeditious resolution of misconduct issues in grievance-arbitration systems. ***Piedmont Gardens***, 362 NLRB at 1145.

The reasoning of the recently decided ***Apogee Retail LLC d/b/a Unique Thrift Store***, 368 NLRB No. 144 (2019) is instructive. As the Board noted in that case, the reasons underlying an employer's need for confidentiality during an ongoing investigation are "numerous and self-evident." ***Id.* at 6.** The Board cited one of the reasons relied upon by Respondent in the instant matter—to ensure the integrity of the investigation. (RX18) As the Board noted, the integrity of any investigation depends on the investigator's ability to ensure that potential witnesses do not coordinate their accounts of relevant events.[8] ***Id***. In addition, the Board noted as reasons for ensuring confidentiality included obtaining and preserving evidence while employees' recollection of relevant events is fresh, encouraging prompt reporting of a range of potential workplace issues--unsafe conditions or practices, bullying, sexual harassment, harassment based on race or religion or national origin, criminal misconduct, without employee fear of retaliation, and protecting employees from dissemination of their sensitive personal information. ***Id.*** These same interests hold true for confidential witness statements.

Moreover, and importantly, it would be difficult to effectively maintain witness confidentiality if an employer continues to be vulnerable to an ALJ's order to disclose confidential witness statements to the Union via a balancing test that can find, as the ALJD did here, that even where an employer established a valid confidentiality concern (ALJD p. 16, lines 17-19), it should have still been turned over even when the investigation was still pending and no discipline resulted. (ALJD p. 16, line 47, ALJD p. 17, lines 13-16)

[8] Ostensibly this would include preventing the same witness from reviewing earlier statements prior to being recalled for additional questioning.

In the instant case, the ALJ's findings illustrate the problems with the ***Piedmont Gardens.*** The ALJ found that Respondent "offers no explanation for providing" two statements from a different FMLA fraud investigation as opposed to the instant investigation, and, after July 16, when Mr. Wilson had what ended up being his final interview of an investigation that did not close until October 31, 2018[9] (see GCX10), "Respondent would not have any other reason to withhold his interview statements." (ALJD p. 16, lines 24-26) While factually unsupported by the record, the ALJ's reasoning puts a burden upon employers to have an unreasonable amount of foresight to know what the totality of an investigation might uncover so it can precisely know the appropriate time when it will no longer need to re-interview a witness to satisfy itself that potential inconsistencies from other sources have been addressed. In addition, an employer is placed in a Catch-22 in establishing the burden placed upon employers to show not only that confidentiality considerations exist, but continue to exist at all times, and how they may differ between investigations. In this respect, an employer is given the Hobson's choice of either revealing its internal investigation processes in order to defend itself, at the expense of potentially compromising its ability to effectively and confidentially investigate in the future.

Equally problematic is the ALJ's treatment under ***Piedmont Gardens*** of what she found to be Respondent's unmet "burden" of formulating an acceptable accommodation. (ALJD p. 16, lines 31-47; ALJD p. 17, lines 1-5). The Union offered no counter to Respondent's offer, other than, as Union steward Mark Willingham testified "the counter proposal was to give it to me immediately," and failed to identify why Respondent's proposal to delay disclosure until the conclusion of the investigation was insufficient. (GCX10, Tr. 142) Moreover, neither the Union, the GC, nor the ALJ identify why Respondent's proposal was insufficient in light of the fact no discipline had been issued to Mr. Wilson and no grievance was pending for the Union to

[9] Wilson's statement was provided to the Union on November 2, 2018.

process. Indeed, it is difficult to ascertain what purpose relevant to the Union's collective bargaining duties the statement would have while the investigation was still open that would be compromised by delaying until conclusion of the investigation. Still, the ALJ found that the Union had "an equally compelling need for the information." (ALJD p. 16, lines 27-29)

In addition, and ironically, the ALJ found the Union's failure to offer a counterproposal "of no moment." (ALJD p. 17, lines 2-5) Although ***Piedmont Gardens*** requires employers to bargain an accommodation that satisfies its confidentiality interests, in application here, the ALJ requires employers to bargain against themselves where the Union rejects wholesale their offer. The cases relied upon by the ALJ are easily distinguishable, even under the problematic standard articulated in ***Piedmont Gardens*.** To begin, as stated, Mr. Wilson had been issued no discipline when the Union made its request for the statement and no grievance was pending pertaining to Mr. Wilson. In fact, the investigation concluded with no discipline issuing to Mr. Wilson as a result. (Tr. 222) Accordingly, the GC has not established that the accommodation offered to the Union was insufficient.

Also ironically problematic is the ALJ's assignment of significance to Respondent doing precisely what ***Piedmont Gardens*** required—a case-by-case analysis of the confidentiality interests implicated by each request---and using to imply that the fact that two situations were treated differently means something other than the case-by-case analysis brought Respondent to different conclusions under the individual circumstances. (ALJD p. 16, lines 22-24; ALJD p. 17, lines 8-10)

Even under the balancing test articulated in ***Piedmont Gardens***, the ALJ's finding of a violation was in error. (ALJD p. 17, lines 13-16) The relevant inquiry here pertains to the facts surrounding Mr. Wilson's statement. As the record established, Mr. Wilson did not complete his

interview when he was called in for questioning regarding potential FMLA fraud. (Tr. 138). Accordingly, the Company had concerns about releasing the incomplete statement when it was necessary for the Company to call him in again, and for Mr. Wilson to be asked additional questions (giving him time to review the prior questions). (Tr. 139, 244; GCX10) In addition, Human Resources Manager Bob Daragon testified that a bargaining unit employee had shared around that time information about the Union sharing documents with employees in the union office. (Tr. 244-245) Under these circumstances, Respondent determined its confidentiality concerns outweighed the Union's immediate need for the statement and offered to bargain an accommodation, even proposing what it saw as a solution which would protect its concerns pertaining to the investigation, yet infringing upon the Union's representational duties as little as necessary. Thus, it proposed providing the statement at the conclusion of the investigation (when discipline, if any, would be imposed, which the Union could grieve).[10]

What occurred when statements from other interviews were requested depended on the unique set of circumstances evaluated (under ***Piedmont Gardens***) when those requests were made. Clearly, for example, an employee giving a statement to substantiate why his medical condition prevented him from meeting the FMLA call-in window (Timothy Rectenwal, David Vickers, GCX11), does not have the confidentiality considerations present in a fraud investigation. (Tr. 254-256)

In sum, Respondent seeks to have ***Piedmont Gardens*** overturned and the categorical exemption articulated in ***Anheuser-Busch, Inc.***, 237 NLRB 982 (1978) restored. Under either framework, however, the ALJ's finding and conclusion that Respondent violated the Act is

[10] Mr. Wilson was not issued any discipline as a result of this investigation. (Tr. 222)

erroneous and the Consolidated Complaint allegation that Respondent violated the Act by delaying in producing Wilson's witness statement should be dismissed.

C. FEBRUARY 20TH REQUEST

The ALJ erred by failing to find, under the totality of the circumstances, Respondent made a good faith effort to timely provide the requested team leader interview forms to the Union. (ALJD p. 11, lines 39-44)

The information request submitted by second shift committeeman Mark Willingham to Respondent on February 20, 2018, after Robert Watts, Jr. was removed from his team leader position after an investigation by the Joint Team Leader Selection Committee (JTLSC), consisting of both Union and management representatives. (GCX14, Tr. 208-209) With this information request, the ALJ erroneously found Respondent unreasonably delayed in providing four pages of information as part of its larger response. (ALJD p. 11, lines 39-44)

The interviews and the interview forms were completed by the JTLSC and the requested documents were joint documents. (Tr. 159, 214; GCX14) In Mr. Willingham's follow-up, he asked about interview forms as instructed by the JTLSC handbook included in the committee's original packet (Tr. 211; GCX14, p. 45-46, GCX6) What occurred was inadvertent error and misunderstanding that was rectified.

In determining whether an employer has unreasonably delayed in responding to an information request, the Board considers the totality of the pertinent circumstances surrounding the incident. ***West Penn Power Co.***, 339 NLRB 585, 587 (2003). Here, Respondent supplied

most of the information, believed it was providing all of the information, and misunderstood the Union's follow-up question. In addition, because the Union was also present during the interviews at issue and the documents were joint documents, the Union had access to and could have provided more information to Respondent during the time period that it did not have the information, but did not do so. See ***Day Automotive Group***, 348 NLRB 1257, 1262-63 (2006) (finding no violation where the employer had reason to believe it had satisfied the union's request for information and the union did not say the information provided was insufficient or requested additional information).

The missing forms were provided immediately once the error was understood on May 24, 2018—well before the grievances filed pertaining to Mr. Watts' removal from his team leader position were resolved on November 29, 2018. [11] (Tr. 154; GCX6; RX14; RX15; RX17) Thus, once Respondent understood that information was not provided, Respondent immediately provided the information, and the Union had within its possession these four pages of inadvertently omitted information for six months before the grievance which led to the filing of the information request was ultimately resolved. Accord ***LTD Ceramics***, 341 NLRB 86, 87–88 (2004) (finding that the employer did not refuse to provide information in violation of the Act, in part because the employer provided some information in response to the Union's request, and any misunderstanding about what additional information the Union still wanted could have been resolved by further communication between the parties); ***Reebie Storage & Moving Co.***, 313 NLRB 510, 513 (1993) (same, where the employer responded in good faith to the Union's

[11] Two of the four interview forms were helpful to Respondent's position that Mr. Watts should be removed, so Respondent had no logical motive for deliberately withholding these documents. (GCX6; Tr. 214-216)

requests, and did nothing to foreclose or discourage the Union from pursuing its interests more actively), enf. denied on other grounds, 44 F.3d 605 (7th Cir. 1995).

In sum, the evidence established that in response to this request, Respondent believed it was providing all responsive information. As soon as Respondent understood its omission, it immediately rectified the mistake. Under the totality of the circumstances, this did not constitute unreasonable delay. Accordingly, the ALJ's finding was in error, and the Consolidated Complaint allegation should be dismissed.

III. Conclusion

Based upon the entire record in this case and upon the arguments recited above, it is respectfully requested that the Consolidated Complaint be dismissed in its entirety.

Respectfully submitted this 3rd day of January, 2020.

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of January, 2020, I electronically served copies of **RESPONDENT FCA'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINSTRATIVE LAW JUDGE'S DECISION** on the following parties of record:

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